July 8, 2020, webinar presenters:
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This document and the related webinar assume some general familiarity with the requirements of the amended Title IX regulations, including especially:

• **Section 106.8**: Addressing the designation of a Title IX Coordinator, the adoption of grievance procedures, and notice/dissemination of policies

• **Section 106.30**: Important new definitions added by the Final Rule

• **Section 106.44**: Addressing the requirements for school districts to respond to each report or complaint of sexual harassment of which the district has actual knowledge

• **Section 106.45**: Requiring school districts to establish and administer a grievance process for formal complaints of sexual harassment; also addressing training and recordkeeping requirements

• **Section 106.71**: Non-retaliation and confidentiality requirements.

**NOTICE:** This document and the comments of the webinar speakers do not constitute legal advice and should not be relied upon or used as legal advice. This document presents information and commentary to facilitate a general understanding of the topics that are addressed, but it does not present an exhaustive or complete treatment of any legal or policy issues. If a school district requires legal advice regarding any topic, issue, situation or incident, the advice should be obtained from the school district's designated legal counsel.
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What do the new Title IX regulations cover?

In broad terms, the new Title IX regulations, which take effect on August 14, 2020, require school districts to address all of the following:

1. **Nondiscrimination policy statements** regarding sex discrimination under Title IX, including express identification of the **Title IX Coordinator**.

2. **A grievance procedure** for receiving and responding to complaints of **sex discrimination** under Title IX.

3. District responses when the district has **actual knowledge** of an incident or allegation of **sexual harassment** under Title IX—regardless of whether or not a formal complaint is filed.**

4. **A grievance process** for addressing **formal complaints of sexual harassment** under Title IX.**

5. **Notices** related to all of the above.

6. Employee **training**.

7. **Recordkeeping, confidentiality, and nonretaliation** in connection with all of the above.

The webinar related to this document focuses primarily on the first 4 items in the list above.

** The most complicated aspects of the new Title IX regulations concern the third and fourth items in the list—dealing with incidents and allegations of sexual harassment under Title IX. The webinar presentation that accompanies this document looks at only a limited piece of everything that there is to know in connection with responding to sexual harassment under Title IX. The limited piece concerns identifying some of the discretionary decisions that school districts are either required or permitted to make in order to establish their revised Title IX policies, procedures, and related notices. For several of those issues, the presenters will provide their initial sense of how most districts are likely going to prefer to address the relevant choice(s).
Who will serve as the district’s Title IX Coordinator(s)?

1. A district must **designate and authorize** at least one employee to coordinate its efforts to comply with its responsibilities under Title IX, which employee(s) must be referred to as the “Title IX Coordinator.” (See §106.8(a))
   
   a. In a large of enough district, it may make sense to designate 2 or more coordinators. One might have primary responsibility for student matters, and one might have primary responsibility for employment matters. This will help to address availability and potential conflicts of interest.
   
   b. In small districts, the district may elect to designate a single Title IX Coordinator with the understanding that it may be possible to also have one or two “liaisons” or “deputies” to assist the individual.

2. Evaluate who the district has already designated to receive complaints of discrimination under section 118.13 of the state statutes and Chapter PI 9 (i.e., pupil nondiscrimination under state law), and who the district has already designated as an equal opportunity compliance officer for other employment matters and other student matters.

3. **Why not the District Administrator?**
   
   a. The Title IX Coordinator will **not** be permitted to serve as the decision-maker or the appeal decision-maker when the district is addressing a formal complaint of sexual harassment.

   b. Time.

   c. Title IX Coordinators may be empowered to investigate formal complaints of sexual harassment under Title IX. If the District Administrator were to investigate the facts of such a complaint, the District Administrator’s investigative report would potentially be reviewed and evaluated by a subordinate employee, which could raise concerns about the impartiality of such decision-makers.

   d. The District Administrator could still be informed of important reports and formal complaints of sexual harassment. There also appears to be some discretion for a Title IX Coordinator to consult with other employees of the educational entity on some matters related to a report or complaint of sexual harassment. However, due to concerns with separation of roles, impartiality, and conflicts of interest, the ability to engage in such consultation has limits. For example, if the District Administrator is going to act as the appeal decision-maker (see below), then the investigator and initial decision-maker should generally avoid consulting with the District Administrator about their substantive fact-finding and the determination of responsibility.
What is the key language that, under the new Title IX regulations, needs to appear in school districts’ nondiscrimination policies?

1. A school district nondiscrimination policy must state the following (see §106.8(b)):
   a. The District does not discriminate on the basis of sex in the education program or activity that it operates, and the District is required by Title IX and 34 C.F.R. ch. 106 not to discriminate in this manner. The requirement not to discriminate in the District’s education program or activity extends to admission (as applicable) and to employment.
   b. Inquiries about the application of Title IX and 34 C.F.R. ch. 106 (i.e., the federal Title IX regulations) to the District may be referred to the District’s Title IX Coordinator, to the Assistant Secretary at the U.S. Department of Education, or both.

2. WASB and Boardman Clark recommend including the designation, authorization, and the identification of and contact information for the Title IX Coordinator(s) directly in school district nondiscrimination policies. (See §106.8(a))
   a. The designated employee(s) must be referred to as the Title IX Coordinator.
   b. The applicable identification/contact information includes the name or title, the office address, the email address, and telephone number of the employee(s) designated as the Title IX Coordinator.

3. Most districts will elect to incorporate the mandatory Title IX policy language in nondiscrimination policies that also address other forms of unlawful discrimination and other nondiscrimination laws.

4. Some districts may end up repeating the critical Title IX policy language in more than one policy (e.g., a student nondiscrimination policy and an equal employment opportunities policy).

5. The Title IX Coordinator contact information may be repeated not only in multiple nondiscrimination policies and in various required notices, but it is also likely to appear in different reporting/complaint/grievance procedures.
Under the Title IX regulations, what is the difference between the Title IX “grievance procedure” and the Title IX “grievance process”?

1. When the regulations refer to a school district’s Title IX “grievance procedure” they are referring to steps for responding to and resolving reports or complaints of possible unlawful discrimination based on sex under Title IX, other than formal complaints of sexual harassment under Title IX.

   a. The regulations state that each school district must adopt and publish grievance procedures that provide for the “prompt and equitable resolution” of complaints alleging any action that would be prohibited by Title IX and its implementing regulations. For complaints under Title IX, the grievance procedure applies only to sex discrimination occurring in the district’s education program or activity against a person in the United States. (See §106.8(c) and (d))

   b. An example of a Title IX complaint that would not be a sexual harassment complaint and that would be directed to the “grievance procedure” would be a complaint that the school district provides unequal financial support and facilities in athletics based on sex. So, in addition to certain discriminatory conduct by individuals, Title IX complaints can also challenge district policies, procedures, and practices.

   c. Most districts have an existing complaint procedure that, perhaps with some modifications, can be identified and used as the Title IX grievance procedure.

   d. Most districts will use the same “procedure” for receiving and responding to complaints of unlawful discrimination that are (1) Title IX complaints other than formal complaints of Title IX sexual harassment; (2) based on protected classes other than sex; or (3) based on nondiscrimination laws other than Title IX.

   e. The Title IX regulations specify that a school district’s procedures must allow any person to report sex discrimination, including sexual harassment (whether or not the person reporting is a person who is alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.
2. When the regulations refer to a school district’s Title IX “grievance process,” they are referring to a highly structured process for investigating and resolving formal complaints of sexual harassment under Title IX. (See §106.45)

   a. It is highly unlikely that any school district in the state has an existing complaint procedure that would satisfy the requirements that apply to a Title IX grievance process under the new federal regulations.

   b. A school district is only required to utilize its Title IX “grievance process” when a formal complaint of sexual harassment under Title IX is pending. However, as a very important caveat, use of the Title IX grievance process is also generally a pre-requisite to the imposition of any disciplinary sanction or penalty for substantiated sexual harassment, as defined under the Title IX regulations.

   c. Although the imposition of disciplinary consequences for sexual harassment under Title IX generally must be deferred until the grievance process reaches a final determination, the Title IX regulations do allow for the following:

      i. If the person who is accused of Title IX sexual harassment is a non-student employee, the regulations allow the employer to place the individual on administrative leave while the grievance process is pending. (See §106.44(d))

      ii. Independent of whether a formal complaint is pending and regardless of who has been reported to be the alleged perpetrator of sexual harassment under Title IX (including when such a “respondent” is a student), the regulations allow a school district to remove a respondent from an education program or activity on an emergency basis. This limited authority applies only when the school district determines that there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that justifies removal. Other requirements specified in the Title IX regulations also must be met, and a district must further harmonize the Title IX requirements with other legal requirements (including the rights of individuals with disabilities and the state law requirements for the suspension or expulsion of student). (See §106.44(c))

   d. Title IX’s regulatory definitions of “sexual harassment” and “formal complaint” become extremely important for determining when a district is required to utilize the Title IX grievance process. (See below for more on those definitions.)

   e. As further explained below, there are only two ways to initiate a formal complaint of sexual harassment such that the district is required to use its Title IX grievance process for sexual harassment. First, a complainant (i.e., a person who is alleged to be the victim of conduct that could constitute sexual harassment) may file a formal complaint. Second, the Title IX Coordinator can sign a formal complaint. Someone else who was only a witness or who only has second-hand knowledge of an allegation involving other people could report the information, but the report would not be considered a formal complaint of Title IX sexual harassment.
What is the definition of “sexual harassment” for purposes of Title IX, and how does it differ from other definitions of sexual harassment?

1. As defined in section 106.30(a) of the Title IX regulations, “sexual harassment” means conduct on the basis of sex that satisfies one or more of the following:
   a. An employee of the school district conditioning the provision of an aid, benefit, or service of the district on an individual’s participation in unwelcome sexual conduct;
   b. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district’s education program or activity; or
   c. Any of the following, as defined under the Title IX regulations by reference to other federal statutes:
      ii. “dating violence,” as defined in 34 U.S.C. 12291(a)(10),
      iii. “domestic violence,” as defined in 34 U.S.C. 12291(a)(8), or

2. As is true of all allegations of sex discrimination under Title IX, an allegation of sexual harassment under Title IX must have occurred in the school district’s education program or activity and in the United States.

3. The Title IX definition of sexual harassment is generally understood to be narrower (i.e., cover less conduct) than the broader definitions of sexual harassment that apply under:
   a. Section 111.32(13) of the state statutes which, for purposes of the Wisconsin Fair Employment Act, defines “sexual harassment” to mean “unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature.” “Unwelcome verbal or physical conduct of a sexual nature” includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee’s work performance or to create an intimidating, hostile or offensive work environment.
b. Federal Title VII, also in the employment context (where, for example, conduct that is “severe or pervasive” can meet the applicable standard for a hostile work environment claim).

c. Chapter PI 9 of the Wisconsin Administrative Code, which defines “pupil harassment” as “behavior towards pupils based, in whole or in part, on [any protected status, including sex] which substantially interferes with a pupil’s school performance or creates an intimidating, hostile, or offensive school environment.”

d. Most school districts’ codes of student conduct and employee handbooks. That is, school districts generally assert an interest in intervening in certain inappropriate conduct before it reaches the level of conduct that is legally-actionable as sexual harassment.

4. The significance of the comparatively narrow definition of “sexual harassment” that applies under the Title IX regulations is that:

   a. If the conduct alleged in a formal complaint would not constitute sexual harassment as defined in the Title IX regulations, even if proved, then any formal complaint must be dismissed for purposes of Title IX, and the Title IX “grievance process” would normally end. After dismissal under Title IX, the school district would have authority/discretion to address the complaint/issue under local procedures that apply to other complaints of unlawful discrimination or to particular policy/rule violations.

   b. If conduct of which the school district has actual knowledge (see below) clearly does not rise to the level of sexual harassment as defined under the Title IX regulations, then, for purposes of the Title IX regulations, the district is not charged with the Title IX obligation to “respond promptly in a manner that is not deliberately indifferent,” which would normally include (for example) the consideration and offering of “supportive measures” (see below) for the complainant. (However, a district may have an obligation to respond in some manner under other laws or as defined in local policy.)

   c. Districts cannot use the Title IX definition of sexual harassment as the sole definition of improper sexual harassment within its policies and procedures (including its student and employee handbooks). As explained above, there is other potential legal liability for conduct that would not meet the narrow Title IX standard.

   d. The Title IX definition of sexual harassment is highly relevant for determining how a district responds to a particular incident, report, or complaint of sexual harassment, but it does not fully resolve whether a district should or must respond.
How do the Title IX regulations define a “formal complaint” of sexual harassment?

1. Under section 106.30(a) of the Title IX regulations, “formal complaint” means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school district investigate the allegation of sexual harassment.

   a. A “complainant” means an individual who is alleged to be the victim of conduct that could constitute sexual harassment. (Note: A parent or guardian who is acting on behalf of a child complainant may also file a formal complaint.)

   b. At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the relevant education program or activity of the school district.

   c. As used in the definition, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school district) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

2. The Title IX regulations specify that a school district’s procedures must, at a minimum, allow a complainant to file a formal complaint with the district’s Title IX Coordinator by submitting the document or electronic submission in person, by mail, or by electronic mail, using the contact information that the district has established for the district’s Title IX Coordinator. (See §106.30(a))

   a. A district may designate other methods of filing a formal complaint of sexual harassment.

   b. Should a district designate additional methods of filing a formal complaint? The answer to this question is likely to vary among school districts. For example, a district with a single Title IX Coordinator may need to account for situations where the Title IX Coordinator is temporarily unavailable or is the person accused of sexual harassment. However, as a general premise, school districts will want to maintain reasonable control over how formal complaints can be filed because it is so important to be able to recognize when you have a formal complaint.

3. The authority of the Title IX Coordinator to sign a formal complaint and trigger the district’s Title IX grievance process may be used, for example, when:

   a. The complainant is not eligible to file a formal complaint for purposes of Title IX (e.g., the complainant is a past graduate of the school district and is no longer attempting to participate in a district program or activity);
b. The complainant declines to file a formal complaint, but the Title IX Coordinator determines that the district’s interest in the matter is substantial enough that the matter should be investigated and resolved through the grievance process without the complainant’s direct cooperation.

4. Will the district establish any guidelines or standards for the Title IX Coordinator to follow in circumstances where the regulations permit the Title IX Coordinator to 
   sign (and thereby initiate) a formal complaint? (See §106.30)
   a. The preamble to the final regulations suggests that Title IX Coordinators should have a degree of autonomy to determine whether to sign a formal complaint. At the same time, the preamble suggests that it would not be improper for the Title IX Coordinator to obtain input from other district officials (or potentially from district legal counsel) regarding whether a formal complaint and investigation under the grievance process are warranted. (Preamble, at pp. 30134-30135)
   b. The preamble also states that the Title IX Coordinator’s evaluation of whether to sign a formal complaint in the absence of the complainant electing to file a formal complaint should be evaluated in terms of whether signing a formal complaint (or not signing a complaint) would be a “clearly unreasonable” response. (Preamble, at p. 30045)

5. The existence or non-existence of a formal complaint is highly relevant for determining how a district responds to a particular incident or allegation of sexual harassment, but it does not resolve whether a district should or must respond.

Once a school district has actual knowledge of sexual harassment or allegations of sexual harassment, what do the new regulations require? And, what constitutes “actual knowledge”?

1. A school district with actual knowledge of sexual harassment in the district’s education program or activity must respond promptly in a manner that is not deliberately indifferent.  (See §106.30(a) and §106.44(a))

2. “Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to: (1) the district’s Title IX Coordinator; (2) any official of the school district who has authority to institute corrective measures on behalf of the district; or (3) any employee of the district, other than the respondent (i.e., the alleged perpetrator).
   a. The “any employee” standard that applies to school districts creates a challenge for implementation.
   i. From the perspective of policies and procedures, the key piece will be stating an expectation for employees to report their “actual knowledge” of sexual
harassment to an administrator who is prepared to further assess the situation and determine an appropriate response.

ii. The training, time, and resources that will be required to implement a workable and effective system of district-wide reporting and responses are likely to be substantial, but those demands are arguably tempered a bit by the narrow Title IX definition of “sexual harassment” (see above).

b. Examples of ways that a school district employee could obtain actual knowledge of sexual harassment include:

i. Witnessing an incident (or a perhaps a series of incidents);

ii. Receiving a verbal or written report about an incident or allegation from a student, parent, or other person;

iii. Receiving multiple reports that, taken together, provide a different picture of a person’s conduct than each incident standing alone; or

iv. The filing of a formal complaint or any report under the district’s Title IX grievance procedure or grievance process.

3. A school district is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. Although “clearly unreasonable” seems to allow for substantial discretion, the regulations go on to confine that discretion quite a bit with additional mandates:

a. A district’s response must treat complainants and respondents equitably by:

i. Offering supportive measures (as defined in the regulations, see below) to a complainant, and

ii. Following a grievance process that complies with the regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures.

b. The Title IX Coordinator must promptly contact the complainant to:

i. discuss the availability of supportive measures,

ii. consider the complainant’s wishes with respect to supportive measures,

iii. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and

iv. explain to the complainant the process for filing a formal complaint.
For each response, a district must create records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. (See §106.45(b)(10)(ii))

i. In each instance, the district must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the district’s education program or activity.

ii. If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

d. As mentioned above, the preamble to the final regulations states that the Title IX Coordinator’s evaluation of whether to sign a formal complaint in the absence of the complainant electing to file a formal complaint should be evaluated in terms of whether signing a formal complaint (or not signing a complaint) would be a “clearly unreasonable” response. (Preamble, at p. 30045)

What are “supportive measures” under the Title IX regulations?

1. “Supportive measures” are defined as:
   a. Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
   
   b. Such measures are designed to restore or preserve equal access to the school district's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school district's educational environment, or deter sexual harassment.

2. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

3. In some situations, a school district may determine that it would be necessary or appropriate to provide supportive measures to a respondent, or to provide supportive measures for the benefit of a complainant that directly affect a respondent. However, there is not an obligation to provide supportive measures to the respondent in every case, and the regulations do not require equality or parity with respect to the supportive measures provided to complainants and respondents.
4. A school district must maintain as **confidential** any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school district to provide the supportive measures.

5. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

6. In general, the identification, offering, and monitoring of supportive measures should be an ongoing and continuous part of responding to any incident, report, or complaint of sexual harassment or alleged sexual harassment **under Title IX**, including but not limited to the period of time when a formal complaint is pending.

7. If the district determines that the allegations of inappropriate conduct, even if proven, would not constitute sexual harassment that is covered by Title IX, then there is no obligation under the regulations to provide (or continue to provide) supportive measures. However, even in non-Title IX cases or in harassment/bullying cases that are not related to a legally-protected status, a district may elect to offer or provide an individual with interventions or supports that are substantially similar to Title IX “supportive measures.”

Aside from the Title IX Coordinator, who will perform the other specific roles required under the Title IX regulations when a district is addressing a formal complaint of sexual harassment under Title IX?

1. Prior to reviewing the role assignments addressed in this section, review section 106.45 of the regulations. It is important to have the overall context of the Title IX grievance process in mind in order to address the areas where the regulations allow some discretion.

2. Who will be authorized to serve as an **investigator** of formal complaints of sexual harassment under Title IX? (See §106.45)
   a. This can be (but does not have to be) the Title IX Coordinator.
      i. In a large enough district, there may be benefits to having someone other than the Coordinator perform most investigations.
      ii. Skills and competence relative to the nature of the complaint should play a factor in determining whether the Title IX Coordinator or someone else should investigate a particular complaint.
   b. If practical, there may be benefits to having multiple people trained to perform the role.
   c. The role can be outsourced to a properly trained individual.
3. Who will be authorized to make determinations of responsibility based on the evidence generated by the investigation? (See §106.45)
   a. The decision-maker role cannot be performed by the Title IX Coordinator or by the person who served as the investigator for the particular complaint. (See §106.45(b)(7))
   b. If practical, there may be benefits to having multiple people trained to perform the role.
   c. The role can be outsourced to a properly trained individual, but there may be some disadvantages to doing so in at least some cases.

4. Who will be authorized to respond to appeals that arise out of any formal complaint case under Title IX? (See §106.45(b)(8))
   a. This role cannot be performed by either the Title IX Coordinator, the investigator, or the individual who made the determination of responsibility in the particular case. (See §106.45(b)(8)(iii))
   b. The role can be outsourced to a properly trained individual, but there may be some disadvantages to doing so in at least some cases.
   c. Will the school board have any role in the Title IX grievance process for formal complaints sexual harassment, or only in potential post-Title IX or non-Title IX proceedings (e.g., student expulsion, employee discipline/termination decisions and grievances related to discipline or termination)?

5. If the school district elects to offer a voluntary informal resolution process, as permitted under the federal regulations, who will be authorized to serve as a facilitator for such a process? (See §106.45(b)(9)).
   a. It appears possible for this role to be performed by the Title IX Coordinator.
   b. It appears possible for this role to be performed by other persons who are also trained as investigators, decision-makers, or appeal decision-makers.
   c. Although not expressly prohibited by the regulations, it is possible that facilitating a voluntary resolution process may disqualify a person from later serving in a different role in the same case.
      i. The regulations do not expressly prohibit, for example, an investigator from attempting a facilitated resolution or require disqualification as an investigator if the attempt at informal resolution is abandoned. And, opportunities for informal resolution may sometimes become apparent during the course of an investigation.
ii. Even if allowable, school districts should likely avoid having a facilitator from the same case later serve as the decision-maker or appeal decision-maker.

6. Most districts should consider cross-training multiple individuals who can interchangeably serve as an investigator, decision-maker, and appeal decision-maker.

7. How will school district policies and procedures account for possible exceptions to the normal assignment and performance of these roles, keeping in mind the specific training requirements that apply to each role (see below for more information about required training)?
   a. Exceptions could arise, for example, as a result of possible conflicts of interest or concerns with bias or due to the time commitment or skills/experience required to address a particularly complex complaint.

8. Is it necessary for school board policy to expressly identify all persons authorized to perform roles other than Title IX Coordinator?
   a. No. The key is that each district must determine who will be trained to perform the roles, assign the relevant duties, and complete the training.
   b. School districts should review the job descriptions of persons who will be involved in the Title IX grievance process and revise the job descriptions if needed. Note that under Chapter PI 8 of the Wisconsin Administrative Code, the job descriptions for most licensed positions are to be approved by the school board.

9. How and when will the district provide the federally-mandated training applicable to each of these roles? §106.45(b)(1)(iii)
   a. The specific mandates found in the regulations are content based. However, consider the following potential needs:
      i. Initial training to achieve basic compliance in the short term.
      ii. The potential benefits of training the individuals who may perform each of the designated roles together in a common setting (perhaps at a later point to supplement initial training).
      iii. The value of refresher and/or other periodic training.
   b. Specific training requirements are specified in §106.45(b)(1)(iii): “A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue,
conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.”

c. Although not otherwise mentioned in the regulation quoted immediately above, another section of the regulations refers to the person(s) who are charged with responding to appeals as a type of “decision-maker.” (See §106.45(b)(8)(iii)(B).) School districts should assume that individuals who respond to appeals are required to receive “decision-maker” training.

In addition to items already mentioned above, what are some additional discretionary decisions related to the grievance process for addressing formal complaints of sexual harassment under Title IX that school districts need to think about?

1. Prior to reviewing the issues presented in this section, review section 106.45 of the regulations. It is important to have the overall context of the grievance process requirements in mind in order to address the areas where the regulations allow some discretion.

2. How will the district structure its Title IX grievance process in relation to other complaint procedures and other pre-disciplinary procedures in the district? The district will be responsible for responding to reports and complaints of sexual harassment under various other state and federal laws and local policies. Sometimes, the complaints will overlap with Title IX, and sometimes they will not. Similarly, conduct involving potential sexual harassment raises the possibility of disciplinary outcomes. However, to reach a disciplinary outcome (if the allegations are substantiated), a district will have to harmonize the requirements of Title IX with the requirements of other disciplinary procedures (e.g., student suspension or even expulsion).

   a. Will the Title IX grievance process be used to address and resolve any complaints other than a formal complaint of sexual harassment under Title IX?

      i. When a district determines that it has a formal complaint of conduct that could constitute sexual harassment under Title IX, the district will likely want to use the Title IX grievance process as a means for simultaneously assessing the same conduct under other applicable laws (e.g., Title VII, section 118.13, etc.) and under any applicable local policies, rules, or codes of conduct.
ii. However, any time a school district determines that it is not required to use the Title IX grievance process (e.g., because a formal complaint is not filed or because there is a basis for the dismissal of a formal complaint under Title IX), the district will likely prefer to address any remaining issues under its more general discrimination complaint procedures or other applicable processes.

b. The harmonization of disciplinary processes is likely to become a long-term project and involve a combination of initial policy work, training, case-by-base decision-making, and revisiting policies as more is learned about the Title IX regulations.

3. Authority to dismiss formal complaints of sexual harassment:

   a. Who will be authorized to determine whether a formal complaint of sexual harassment under Title IX must be dismissed under the standards identified in the federal regulations (i.e., mandatory dismissals)? (See §106.45(b)(3))

   b. Who will be authorized to sign off on a discretionary dismissal of a formal complaint under the standards identified in the federal regulations? (See §106.45(b)(3))

   c. Keep in mind that dismissals are appealable decisions, but only on the limited grounds specified in the regulations or under any additional grounds specified in the local grievance process. (See §106.45(b)(8))

   d. Dismissal for purposes of Title IX does not mean that the school district needs to drop the matter altogether. The matter may still be investigated under another law or under a local policy, rule, or code of conduct.

   e. School districts may wish to consult with legal counsel regarding dismissal decisions.

   f. Title IX Coordinators and complaint investigators will have to confront the applicable dismissal standards in the performance of their roles, even if they are not granted unilateral and final decision-making authority regarding the dismissal of a formal complaint for purposes of Title IX.

   g. When a Title IX Coordinator signs a formal complaint, there would likely be some benefit to giving another district official a role in applying the relevant dismissal standards.

4. Will the district offer the parties to a formal complaint the opportunity to voluntarily participate in a facilitated informal resolution process, such as mediation, that does not involve a full investigation and adjudication of the complaint? (See §106.45(b)(9))

   a. A variety of conditions must be met in connection with offering a facilitated informal resolution process.
b. A school district may not offer an informal resolution process for alleged conduct that could constitute sexual harassment under Title IX unless a formal complaint has been filed.

c. A school district may not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

d. The preamble to the final regulations mentions that, in addition to mediation and restorative justice techniques, another potential function of “informal resolution processes” would be to (with consent of the parties) truncate the steps of the grievance process when the facts are not in dispute. With this concept in mind, it is likely that most districts will want to include the possibility of offering an informal resolution process.

5. Will the district establish any restrictions regarding the extent to which a party’s advisor may participate in the proceedings? Any such restrictions must apply equally to both parties. (See §106.45(b)(5)(iv))

   a. The regulations define a number of points at which a party’s advisor must be allowed to be involved in grievance process, including during any hearing or meeting with the party that the school district holds related to the complaint.

   b. In the employment context, the right to have an advisor in the Title IX grievance process should be harmonized with requests to have an advisor or witness present in a meeting that may lead to discipline.

   c. An example of a restriction on an advisor’s participation would be a restriction against an advisor responding to questions on behalf of the person they are advising.

6. What expectations will the district establish for the time frames under which reports and formal complaints of sexual harassment will be processed?

   a. The regulations require the Title IX grievance process to include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the school district offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. (See §106.45(b)(1)(v)).

   b. In some subsections, the regulations establish mandatory time frames or mandatory standards for providing certain notices to parties. (See e.g., §106.45(b)(2), §106.45(b)(5)(vi), and §106.45(b)(5)(vii))
In cases that involve students as the complainant (i.e., alleged victim of sexual harassment), the Title IX time frames established by the regulations and by the district will need to be coordinated and harmonized with the expectation in Chapter PI 9 that districts must have a procedure for resolving complaints of pupil discrimination that provides for “a determination of the complaint within 90 days of receipt of the written complaint unless the parties agree to an extension of time.”

7. WASB and Boardman Clark recommend avoiding any language in a local policy or procedure that would limit the school district from using its discretion, as permitted under the regulations, to consolidate two or more formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances. (See §106.45(b)(4)).

8. Will the district offer a hearing opportunity as part of its Title IX grievance process for formal complaints of sexual harassment? If so, to what extent? (See §106.45(b)(6)(ii)).

   a. WASB and Boardman Clark currently see more disadvantages than advantages to offering a hearing as part of the Title IX grievance process. That is, most districts will decide not to include a hearing in the grievance process.

   b. There may be instances where, after a Title IX determination, an employee becomes entitled to a due process hearing in connection with the imposition of discipline (e.g., termination of an employment contract) or a hearing in connection with a state law grievance over discipline that has been imposed by the district. Similarly, a student would be entitled to a hearing in connection with any expulsion proceeding.

9. Which standard of evidence will the district use when determining responsibility in a formal complaint case: (1) the preponderance of the evidence standard; or (2) the clear and convincing evidence standard? (See §106.45(b)(1)(vii))

   a. The regulations require the school district to apply the same standard of evidence for formal complaints against students as for formal complaints against employees, and to apply the same standard of evidence to all formal complaints of sexual harassment.

   b. WASB and Boardman Clark anticipate that nearly all districts will opt to use the “preponderance” standard. It is the dominant standard applicable to both student and employee disciplinary matters. However, it is critical that each district review all policies, contracts, and handbooks to determine if the district has already committed to the higher standard in any context that would affect a sexual harassment investigation and determination of responsibility.
c. Separate from the standard of evidence, the regulations specify that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school district. (See §106.45(b)(5)(i))

10. How will the district “describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the [school district] may implement following any determination of responsibility”? (See §106.45(b)(1)(vi))

11. Will the district expand the grounds for appealing a determination of responsibility on, or a dismissal of (in whole or in part), a formal sexual harassment complaint beyond the grounds expressly required under the Title IX regulations? (See §106.45(b)(8))

   a. The bases for an appeal established by the regulations are the following:

      i. A procedural irregularity that affected the outcome of the matter;

      ii. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

      iii. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

   b. Any additional grounds for an appeal (for example, an appeal alleging that the initial determination of responsibility was substantively erroneous or provided improper remedies) must apply equally to both parties.

   c. A school district must follow other regulatory requirements in connection with offering any such additional grounds for an appeal.

   d. In evaluating this question, school districts need to consider the appeal rights that exist under Chapter PI 9 for complainants to appeal a negative determination to DPI, the right of persons to complain to the U.S. Department of Education, and the appeal/grievance rights that arise under state law in connection with student and employee discipline.

   e. WASB and Boardman Clark see both disadvantages and advantages to expanding the grounds for appeal within the local Title IX grievance process. The position(s) that the district expects to use as initial-level decision makers would be a relevant consideration, as would the scope of appeal that the district offers for other types of discrimination complaints.
Authority to determine supportive measures and remedies/sanctions

1. Who will be authorized to commit the district to particular supportive measures in a particular situation?
   a. The regulations provide, “The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.” (See §106.30)
   b. Will the Title IX Coordinator have some authority to determine and institute supportive measures without further approval?

2. Keeping in mind all applicable legal requirements and existing district policies relating to the discipline of students and employees, to what extent will responsibility decision-makers (i.e., initial-level) be authorized to commit the district to particular sanctions and remedies in connection with a determination of responsibility in a formal complaint case?
   a. The regulations provide that the decision-maker’s written determination of a formal complaint must include: “A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the [school district’s] education program or activity will be provided by the [district] to the complainant.” (§106.45(b)(7)(ii)(E))
   b. The regulations provide, “The Title IX Coordinator is responsible for effective implementation of any remedies.” (§106.45(b)(7)(iv))
   c. For some disciplinary sanctions, including the expulsion of a student and the dismissal of a teacher or administrator contracted under section 118.22 or 118.24 of the statute statutes, school board action would be required to impose the consequence. In some districts, local policy currently requires the school board or the district administrator to determine and impose discipline for non-contracted employees. Other potentially disciplinary measures, such as a suspension under an athletic code of conduct, may require other collateral proceedings.
   d. The local grievance process should not overstate the authority of the decision-maker to impose final discipline and may instead refer to recommending certain sanctions that would be beyond the decision-maker’s direct authority.
Expectations and requirements for all employees

1. Will the district require all employees to participate in a **general, awareness-level training** module?
   
   a. If so, when and how will the module be offered?

2. Because school districts are charged with “actual knowledge” of sexual harassment based on notice to any employee, school districts will likely want to establish a mandate that all employees are required to promptly **further report incidents of sexual harassment of which the employee has knowledge** to a Title IX Coordinator or other administrator. (See §106.30)
   
   a. Some incidents (such as a sexual assault) may also be subject to mandatory reporting obligations established under other laws (such as mandatory reporting of child abuse and neglect).

Expectations and requirements for volunteers and contracted parties who perform roles that are similar to roles performed by school district employees (e.g., volunteer coaches)

1. Will the district require these individuals to participate in a general, awareness-level training module?

2. Will the district establish an expectation that such individuals are required to promptly **escalate reports or known incidents of sexual harassment** to a Title IX coordinator or other administrator?

Local approval of revised policies and procedures

1. The Title IX regulations do not set forth any specific approval requirements.

2. For policies and procedures that your school district adopts at the school board level, follow the local procedures for adopting such board policies and procedures. In addition:
   
   a. Chapter PI 9 of the Wisconsin Administrative Code states that pupil nondiscrimination policies, including those that are adopted in compliance with federal statutes such as Title IX, “shall be adopted by the board following a public hearing or an opportunity for public commentary at a board meeting.”

   b. Accordingly, revisions to local student nondiscrimination policies should adhere to this public hearing/public comment requirement. (Note: Complaint
procedures do not appear to be subject to the public hearing/public complaint process."

3. It is possible that some school boards will delegate some of the relevant procedural determinations to the administration. In that case, follow the district’s process for adopting formal administrative rules/procedures.

Notice obligations and mandates for policy dissemination under the new Title IX regulations

1. School districts must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school district of all of the following (see §106.8):

   a. The name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.

   b. That the school district does not discriminate on the basis of sex in the education program or activity that it operates, and that the school district is required by Title IX and Part 106 of Title 34 of the Code of Federal Regulations not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to student admissions (as applicable) and employment, and that inquiries about the application of Title IX and Part 106 to the school district may be referred to the school district’s Title IX Coordinator, to the Assistant Secretary at the U.S. Department of Education, or both.

   c. The school district’s Title IX grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school district will respond.

2. In addition, each school district must prominently display the contact information for the Title IX Coordinator (as identified above) and the district’s Title IX nondiscrimination policy on its website, if any, and in each handbook or catalog that it makes available to the persons who are entitled to receive the notifications listed above. (See §106.8(b)(2))

   a. The Title IX regulations do not expressly require a school district to post notice of its Title IX grievance procedure and grievance process on the district’s website, but it would be a best practice to do so.
3. Many school districts will elect to coordinate the above-identified Title IX notice requirements with other nondiscrimination notice requirements established under state or federal law.

   a. Chapter PI 9 of the Wisconsin Administrative Code requires school districts to:

      i. Publish an annual notice of the school board pupil nondiscrimination policies, including the name and address of the employee designated to receive complaints, as a Class 1 Legal Notice under Chapter 985 of the Wisconsin statutes.

      ii. Include a pupil nondiscrimination statement (addressing more than just discrimination based on sex) on pupil and staff handbooks, course selection handbooks and other published materials distributed to the public describing school activities and opportunities.

      iii. Include the district’s PI 9 pupil discrimination complaint procedure in student and staff handbooks.

   b. Various federal laws other than Title IX also include requirements for giving certain nondiscrimination notices.

4. Any publication used or distributed by the district must not state the institution treats applicants, students, or employees differently on the basis of sex, except as such treatment is permitted by Title IX or by 34 C.F.R. ch. 106 (i.e., the Title IX regulations).

5. Each school district must make any training materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process publicly available on its website. (See §106.45(b)(10)(i)(D))

Be cognizant of the potential need and potential value of harmonizing related policy areas.

1. As a district works on its nondiscrimination and harassment policies, policies related to topics such as bullying, staff-student relations, and even technology use can be implicated directly or indirectly.

2. Student handbooks and employee handbooks also need to be looked at to create overall consistency, and also to include related notices that reflect the new Title IX requirements.

3. Even if a comprehensive review can’t be completed prior to the start the 2020-21 school year, think about how reporting procedures, complaint procedures, and disciplinary statements in various polices might be affected by changes that are made to accommodate the new Title IX regulations.